IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003050

First-tier Tribunal No: HU/55970/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 October 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MOHAMMED ISAAQ MIAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Holmes, instructed by Parkview Solicitors
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 25 October 2024

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 16 May 2015. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his application for entry clearance to the UK.

2. The appellant applied on 28 January 2021 for entry clearance to the UK under Appendix FM to the Immigration Rules as the child of his father, the sponsor, Eyayor Miah. The application was made for both himself and his mother, the wife of the sponsor. His mother was granted entry clearance. The appellant's application was, however, refused, in a decision of 4 April 2023.

3. The respondent, in refusing the appellant's application, considered that the suitability provisions in S-EC.1.9(a) of Appendix FM applied on the grounds that his father posed a risk to him as he had a conviction as an adult, in the UK, for an offence against a child. The respondent considered the appellant's situation in line with her duty to safeguard children under section 55 of the Borders, Citizenship and Immigration Act 2009 and decided that there were no exceptional circumstances in his case for the purposes of GEN.3.1 and GEN.3.2 of Appendix FM.

4. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge McAll on 1 May 2024. The appellant was residing in Bangladesh with his mother and maternal grandparents at the time and his father, the sponsor, appeared at the hearing and gave oral evidence. The judge noted that the sponsor was a British citizen who had been born in Bangladesh and had come to the UK at the age of one year. He noted further that the appellant's mother had been granted leave to enter and remain in the UK based upon her relationship with the sponsor and had entered the UK and obtained her biometric documents before returning to Bangladesh to care for the appellant. The judge noted that the sponsor was convicted, on a guilty plea, of a sexual offence against a child for which he received a sentence of three years imprisonment on 31 October 2011, and that he had been placed on the Sex Offender Register for an indefinite period of time and had a Sexual Harm Prevention Order (SHPO) issued against him.

5. The judge noted the sponsor's evidence that he visited Bangladesh once or twice a year and had stayed there for four weeks in 2022 and the same in 2023, and that he communicated with the appellant three or four times a day by video call and telephone. The judge accepted that evidence. However he did not accept the submission that the fact that the sponsor had visited the appellant in the past supported the argument that he did not pose a risk to the appellant. Although it was argued on behalf of the appellant that the sponsor would have had to inform the police and his offender manager from the probation service when he left the UK to visit his son, under the terms of his licence, and that they had never prevented him from visiting him unsupervised, the judge noted that there was no documentary evidence from the police or the probation service to confirm that they had no concerns that the sponsor posed a risk to the appellant or that they were even aware that the sponsor was visiting the appellant. The judge considered that it was open to the sponsor to obtain such confirmation but he had not done so.

6. The judge had the sponsor's OASys report before him which confirmed that in 2010, at the age of 26 years, the sponsor was involved in sexual activity with a girl aged 14 years old at a house party and was committed to prison for 36 months on 31st October 2011, that on the 14 June 2013 he was recalled to prison having breached the terms of his licence by attending another house party at which alcohol and young girls were present (although he was not prosecuted), and that he was convicted for the first time at the age of 19 years old and had been convicted on 14 separate occasions including a conviction for assault on a former female partner. The judge found that the OASys report undermined the sponsor's claims that he had made a "mistake" and that he was unaware the victim was a minor and considered that the sponsor appeared to be attempting to minimise both the offence and his participation in it. The judge gave little or no weight to three character references provided for the appeal. He found there to be no independent evidence to support the argument that the sponsor did not pose a risk to the appellant and he concluded that the sponsor posed a risk to the appellant, such that the respondent's decision under S-EC.1.9(a) was correct. The judge then turned to Article 8 outside the rules and found that it was not in the appellant's best interests to live with the sponsor and that the risk posed to the appellant outweighed the sponsor's and his wife's wish for them to live together in the UK. The judge accordingly found that the respondent's decision was proportionate and was not in breach of Article 8 and he dismissed the appeal.

7. The appellant sought permission to appeal against Judge McAll's decision on three grounds. Firstly, that the judge had failed to recognise that the burden of proof lay upon the respondent and not the appellant in cases involving the suitability provisions of the immigration rules; secondly, that the judge had undertaken a flawed interpretation of the relevant rule by failing, like the respondent, to identify what the risk was to the appellant; and thirdly, that the judge had failed to give adequate reasons for his decision.

8. Permission was granted in the First-tier Tribunal.

Hearing and Submissions

9. The matter came before me for a hearing. Both parties made submissions..

10. Mr Holmes submitted that the burden of proof lay upon the respondent to demonstrate, by way of evidence, the risk upon which she relied. He submitted that the severity of the allegation made against the sponsor meant that the strength and cogency of the evidence had to be at the highest level and that there had to be anxious and heightened scrutiny of the evidence. He relied upon the cases of Balajigari v The Secretary of State for the Home Department [2019] EWCA Civ 673 and Giri, R (On the Application Of) v Secretary of State for the Home Department [2015] EWCA Civ 784 in that respect. With regard to the first ground, Mr Holmes submitted that the judge had referred at [6] to the burden of proof being upon the appellant and had failed to state anything expressly or impliedly to show that he acknowledged that the burden of proof law was upon the respondent in this case. He submitted that the judge had therefore failed to direct himself properly as to the correct burden of proof. With regard to the second ground, Mr Holmes set out what he considered to be the correct interpretation of S-EC.1.9, namely that the respondent had to (i) plead and establish an identified and particularised risk, which was of; (ii) sufficient severity so as to warrant separation of the appellant from his father and the separation of the appellant's parents. Mr Holmes submitted that the respondent had failed to identify the risk, but simply relied upon the sponsor's conviction from 2011, which was an insufficient basis to infer a risk to the appellant, and that the respondent and the judge had therefore failed to correctly interpret and apply S-EC.1.9. Mr Holmes submitted that the third ground was a reasons challenge and that firstly, there had been a lack of any particularised risk and secondly, the judge had failed to address the question of whether there were less intrusive means to meet the public interest which the suitability provisions were supposed to address, such as measures being put in place to protect the child in the UK rather than excluding him. There was therefore a failure in the judge's Article 8 analysis.

11. Mr Tan submitted that the grounds now being raised followed a different approach to that upon which the case was presented in the First-tier Tribunal. He submitted that S-EC.1.9 provided for a mandatory requirement of refusal of entry clearance where the Secretary of State considered the applicant's parent to pose a risk to the applicant and that the burden lay on the respondent to the extent that she had to show that the person was convicted of an offence against a child, which was the case here. The conviction therefore raised a presumption of risk and as such the primary burden of proof had been discharged by the respondent. Mr Tan referred to the appellant's skeleton argument before the First-tier Tribunal which referred to the burden of proof being on the appellant and he submitted that that was therefore the agreed position between the parties before the Tribunal, which reflected the respondent's guidance "Family Policy – Family life (as a partner or parent) and exceptional circumstances" – Version 20.0 14 February 2024. The Tribunal properly followed that approach, and went on to consider whether the presumption of risk had been rebutted by the appellant. The appellant's grounds were therefore misguided. Mr Tan relied upon the case of Lata [2023] UKUT 163 in that respect. The judge considered the rule as read, and the

second ground was an attempt to read more into the rule than it actually contained. As for the third ground, Mr Tan submitted that the judge gave proper reasons for considering that the sponsor posed a risk to the appellant.

12. Mr Holmes, in response, submitted that Lata was not authority for the broad proposition stated by Mr Tan. He submitted that the appellant's skeleton argument was wrong in law in its reference to the burden of proof and the Tribunal was wrong to follow it, He submitted further that there was no support for the proposition that the rule was to be treated in the way Mr Tan suggested, as giving rise to a rebuttable presumption analogous to that in section 72 of the Nationality, Immigration and Asylum Act 2002.

Analysis

13. Although not a matter raised before me at the hearing, I make a preliminary observation that in the First-tier Tribunal's decision granting permission it was found that the judge had arguably erred in law by failing to take account of the fact that the sponsor's conviction related to a female and by failing to mention in the decision that the appellant's mother had been granted entry clearance to join his father in the United Kingdom. Neither of these statements are correct. At [41] the judge specifically noted that the risk stated in the OASys report was to "children – specifically teenage girls" and throughout his decision referred to the nature of the appellant's offending in relation to teenage girls. There is therefore no basis for suggesting that the judge failed to consider that the offence related to a female. Further, at [18], the judge expressly referred to the appellant's mother having been granted entry clearance. It seems to me, in the circumstances, that to some extent at least permission was granted on a flawed basis.

14. In any event, and aside from the above observation, having considered the grounds as pleaded and as argued by Mr Holmes, I do not find that they have merit and I do not find them to be made out. As Mr Tan pointed out, the approach to the appellant's case, as now pleaded in the grounds and submissions, is on a different footing to the approach before the First-tier Tribunal. As such, it seems to me that the grounds are effectively an attempt to re-argue the appellant's case on a different basis to which it was argued before the First-tier Tribunal. There was never any question raised before the Tribunal of the respondent having failed to discharge the burden of proof upon her. As Mr Tan submitted, the judge's reference at [8] to the respondent's guidance "Family Policy – Family life (as a partner or parent) and exceptional circumstances", followed by the extract from the rules, confirmed the respondent's approach to such cases and accepted, albeit not in express terms, that the respondent had discharged the primary burden of proof by way of reference to the sponsor's conviction, in accordance with S-EC.1.9(a). The appeal proceeded on the basis that the onus then lay on the appellant to show that the sponsor did not pose a risk to him. That was the case as stated in the appellant's skeleton argument and was the agreed position before the Tribunal. In that respect Mr Tan's reliance upon Lata is of relevance and I disagree with Mr Holmes's submission that the Tribunal was being required to follow a legally erroneous approach. Whether or not it is correct to treat the issue as that of a rebuttable presumption, there is certainly some force in the analogy to the presumption in s72 of the NIAA, as relied upon by Mr Tan. In any event I find no error of law in the judge's approach to the application of the rule.

15. Likewise, the second ground seeks to re-state the appellant's case on a different basis to that put to the First-tier Tribunal Judge, and I agree with Mr Tan that the ground seeks to read more into the rule than is actually stated. The appellant's case before the First-tier Tribunal did not seek to challenge the failure by the respondent to identify a particularised risk posed by the sponsor to the appellant, but simply proceeded on an analysis of whether that risk existed, as made clear at [24] of the judge's decision. That was therefore the basis upon which the judge considered the

matter, as he was entitled to do. It was Mr Holmes's submission that there was an enormous leap between the incident 14 years ago and a finding that the sponsor continued to pose a risk to the appellant, when there were significant differences including the gender and age of the child involved, the family relationship and the passage of time with no further offences. However the judge considered those relevant matters to the extent that they were put to him at the hearing, as recorded at [25]. He gave weight, at [25], to the fact that the appellant's offence took place several years ago in 2010 and he had regard to the fact that the OASys report was a historical document. However he found it relevant that the most recent evidence, in the sponsor's witness statement, was contradicted by the OASys report, in that the sponsor's claim that the incident had been a mistake and that he had been unaware of the victim being a child was rejected in the OASys report. The judge found that the sponsor continued to minimise the offence and he found there to be no evidence to show that he had changed since the findings in the OASys report. He noted at [33] that at the time of the OASys report the appellant was considered to be a risk to children, specifically to teenage girls, and was stated to be a high risk in the community to children, and at [38] he found there to be no independent evidence to support the argument that that risk no longer existed. Those were findings which the judge was entitled to make and the grounds do not identify any error of law in those findings.

16. The third ground, the reasons challenge, adds little to the above. The judge gave detailed and cogent reasons for finding that the evidence did not show that the sponsor no longer posed a risk to the appellant. In so far as Mr Holmes argued that the judge failed, in his Article 8 assessment, to address the question of whether there were less intrusive means by which to meet the public interest, that was again not a matter argued before Judge McAll. In any event it was not for the Tribunal to require the respondent to consider alternative measures such as social services' intervention to protect the child in the UK, as Mr Holmes suggested. Judge McAll made clear that there were sources of evidence which the sponsor could reasonably have obtained to demonstrate that he was no longer a risk to the appellant. It therefore remains open to him to produce such evidence in another application. Judge McAll's Article 8 assessment took account of all relevant matters and was supported by full and proper reasoning. He was entitled to reach the conclusion that he did.

17. For all of these reasons I do not find the grounds to be made out. The judge's decision followed a correct approach to the immigration rules and relevant guidance and involved a full and careful assessment of all relevant matters, with clear and cogently reasoned findings. He reached a conclusion which was fully and properly open to him on the basis of the evidence. Accordingly, I uphold his decision.

Notice of Decision

18. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeal stands.

Signed: *S Kebede*
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 29 October 2024